

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555

- - - - -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

September 17, 2008

4:28 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1 HEARING re Debtor's Motion Pursuant to Section 1015(b) of the  
2 Federal Rules of Bankruptcy Procedure Requesting Joint  
3 Administration of Chapter 11 Cases

4  
5 HEARING re Motion for an Order Pursuant to Section 105(a) of  
6 the Bankruptcy Code Directing that Certain Orders in the  
7 Chapter 11 Case of Lehman Brothers Holdings Inc. be Made  
8 Applicable to LB 745 LLC

9  
10 HEARING re Debtor's Motion Pursuant to Section 105(a) of the  
11 Bankruptcy Code and Bankruptcy Rule 1015(c) and 9007 Seeking  
12 Authority to Implement Certain Notice and Case Management  
13 Procedures

14  
15 HEARING re Debtor's Motion to (a) Schedule a Sale Hearing; (b)  
16 Establish Sales Procedures; (c) Approve a Breakup Fee; and (d)  
17 Approve the Sale of the Purchased Assets and the Assumption and  
18 Assignment of Contracts Relating to the Purchased Assets

19  
20 HEARING re Motion for Order (i) Authorizing Debtor to Obtain  
21 Post-Petition Financing Pursuant to Sections 363 and 364 of  
22 Bankruptcy Code; (ii) Granting Liens and Superpriority Claims  
23 to Post-Petition Lenders Pursuant to Section 364 of Bankruptcy  
24 Code; and (iii) Scheduling Final Hearing

25 Transcribed by: Lisa Bar-Leib

1 dealer finds itself. It is absolutely essential, Your Honor,  
2 that the purchaser have the protections of Section 363 of the  
3 Bankruptcy Code. The transaction, Your Honor, would  
4 contemplate providing continued employment for almost 10 to  
5 12,000 employees as part of this transaction for some period of  
6 time. Some employees will be continued for much longer periods  
7 of time but it will allow a transition, Your Honor.

8 So, how was the transaction structured? It was  
9 structured, Your Honor, so that the two debtors would be  
10 selling certain assets pursuant to Section 363 and in  
11 connection with the broker dealer, Your Honor, in a very  
12 unique -- and I don't think I've ever seen it done before.  
13 There would be at a point in time, as the transaction moves  
14 forward to conclusion, the commencement of a proceeding under  
15 the Securities Investor Protection Act. And a designated  
16 trustee would be appointed immediately and there would be, in  
17 effect, Your Honor, concurrent hearings before Your Honor, I  
18 believe, both in the SIPC proceeding and in the Chapter 11  
19 cases for approval of the sale. In effect, we have used the  
20 expression, Your Honor, of forward the pre-pack SIPC  
21 proceedings. And I have to inform Your Honor that what has  
22 gone on in the last four or five days -- it seems like one long  
23 day -- is complete cooperation with the regulators, the  
24 Securities and Exchange Commission, the Federal Reserve Bank  
25 and the Securities Investor Protection Corporation, to agree on

1 a format which would accomplish the purpose of preserving all  
2 these interests. And why is that so important, Your Honor? I  
3 hate to use the analogy of a melting ice cube. It's been used  
4 too often. So I'm just going to say this is a wasting asset.  
5 It is extremely fragile and sensitive. And it's because of  
6 that that people have been working around the clock. And it is  
7 because of that, Your Honor, that the time, and we recognize  
8 the time element is so tight that we are basically asking Your  
9 Honor to set a -- sign a -- enter a sales procedure order which  
10 will set up a hearing on late Friday afternoon. And the  
11 coordination to get the time for the hearing on Friday  
12 afternoon is very complex because it has to resonate with the  
13 regulators. It has to be sufficient to allow the transfer of  
14 all these accounts at the close of the market. And this  
15 includes not only securities accounts, Your Honor, but  
16 commodities futures accounts which is a very complex area.

17 It is a very complex transaction. As Your Honor  
18 knows, the papers weren't filed till 6 a.m. this morning. The  
19 negotiations -- and I want to tell you negotiations, Your  
20 Honor, never stopped. People never went to sleep to get this  
21 transaction. And why did they do that? Because of the  
22 sensitivity of this transaction. And, Your Honor, just the  
23 delay from yesterday, when Your Honor was kind enough to give  
24 us a hearing date yesterday, to today has had negative  
25 inferences by a great many people. Is there ever going to be a

1 hearing on this? That's why, Your Honor, we have come forward  
2 today. We want to go forward. And I would point out, Your  
3 Honor, we are not asking for any real substantive relief today  
4 with respect to the sale motion. We are asking Your Honor to  
5 set a hearing for Friday afternoon. And the only sensitive --  
6 I'll call it somewhat sensitive issue is the approval of the  
7 breakup fee.

8 Now, Your Honor, we are talking about a transaction  
9 that has, as I said, many, many parts. But looking at it from  
10 the net of this transaction, there will be approximately  
11 1,700,000,000 dollars yielded out of this transaction.

12 UNIDENTIFIED SPEAKER: A billion.

13 MR. MILLER: I'm sorry?

14 UNIDENTIFIED SPEAKER: A billion.

15 MR. MILLER: You know, I always think of Senator  
16 Dirksen, Your Honor. He said a billion here and a billion  
17 there. Pretty soon you're talking about real money.

18 THE COURT: Well, you're talking about real money  
19 here.

20 MR. MILLER: Absolutely, Your Honor. And so we have  
21 1,700,000,000 dollars. There has been an enormous effort put  
22 into this by the prospective purchaser, Barclays Capital, Your  
23 Honor. And in the negotiations, quite properly, with all of  
24 the efforts that they have put into it, there was a request --  
25 I should say a request, almost a demand, for a breakup fee.

1 And there were negotiations in respect of that amount. And  
2 what it came out to be, Your Honor, was a proposed breakup fee  
3 of a hundred million dollars plus reimbursement of expenses of  
4 up to twenty-five million dollars.

5 THE COURT: May I ask you a question --

6 MR. MILLER: Yes, sir.

7 THE COURT: -- about how to equate that breakup fee  
8 and expense reimbursement with the purchase price? And I've  
9 attempted to assess the notional value of the transaction  
10 because in addition to the 1.7 billion dollars, there's a  
11 reference to 1.5 billion dollars in cure amounts and possibly  
12 as much as 2.5 billion dollars in certain employee related --

13 MR. MILLER: Yes, sir.

14 THE COURT: -- severance expenses which may or may  
15 not be triggered. For purposes of my evaluating the fairness  
16 of the overall proposed breakup fee and expense reimbursement  
17 as a percentage of the transaction, not that I need to do that  
18 but frequently Courts are viewed as approving breakup fees  
19 within a certain market range. How should I view the fair  
20 value of the overall transaction?

21 MR. MILLER: I think, Your Honor, if you start with  
22 the billion seven hundred million dollars, which is the cash  
23 component, as Your Honor obviously read in the papers, there  
24 will be an exposure for 2.5 billion dollars in connection with  
25 the retention of these 10 to 12,000 employees.

1 In addition to that, Your Honor, in connection with  
2 the assumption and assignment of contracts, the cure amounts  
3 and other payments in connection with the contracts, are  
4 estimated to be a billion five hundred million dollars. So we  
5 have four billion dollars right there, Your Honor.

6 In addition, Your Honor, the purchaser is paying 250  
7 million dollars for the goodwill of LBI. So there you have  
8 4,250,000,000 dollars in that respect, Your Honor.

9 And then, Your Honor, in the interim, LBI has entered  
10 into an arrangement with the prospective purchaser where  
11 there's a repo agreement in which they are backing up and  
12 allowing these repos to be settled and to be financed. In  
13 addition, if this goes forward, there will be a support  
14 agreement for this interim period of two or three days where  
15 Barclays Capital will be on premises, will be offering  
16 oversight and in the sole discretion, may be willing to advance  
17 some monies in the interim period.

18 So the problem we had, Your Honor, there are so many  
19 different elements in this transaction that to do the usual  
20 calculation of whether it should be two percent, three percent,  
21 etcetera, became enormously complex during the course of the  
22 proceedings. As Your Honor knows, as these transactions go up  
23 in value, very often the breakup fee goes up in value. And  
24 this -- if Your Honor just took the 1.7, I would say to Your  
25 Honor, it's above three percent, clearly above three percent.

1 THE COURT: I know. I did the calculation.

2 MR. MILLER: Yes, Your Honor. But this is -- again,  
3 I have to use the expression, this is such a unique  
4 transaction. And there's been so much effort and there is so  
5 much exposure. Senior executives at Barclays likewise, like  
6 the rest of us slaves, never went to sleep from Sunday right  
7 through last night.

8 So, I think, Your Honor, there's an extra quota of  
9 consideration that has to be given in connection with this  
10 transaction. And I would also bear in mind, Your Honor, that  
11 what are the prospects of a competitive bid. This is such a  
12 fragile asset. And it is not an asset that people did not know  
13 was for sale. For months now, Lehman Brothers has been  
14 pursuing strategic alternatives. The market has known that  
15 aspects of Lehman, or even all of Lehman, were available for  
16 purchase or investment. So that -- I'm not going to call it  
17 shopworn Your Honor, but that the public, the financial  
18 markets knew that these assets were for sale. And we had a  
19 benefit, Your Honor. We were lucky because Barclays had been  
20 negotiating to acquire Lehman. Unfortunately, that was one of  
21 the things that might have been but never turned into fruition.  
22 But as the part of that process, at least they had some  
23 familiarity. And that was not a long negotiation either, Your  
24 Honor. It was two days, basically. Unfortunately, because of  
25 various regulations in the UK, that transaction could not have



1 gone forward. So we start at least with somebody who had some  
2 knowledge. Otherwise, Your Honor, this wasting asset might  
3 have been wasted. And unfortunately, Your Honor, and I'm not  
4 trying to do the sale hearing now -- in court with us is Mr.  
5 McDade, Herbert McDade, who is the president and chief  
6 operating officer who, if he had to testify, Your Honor, would  
7 testify that if this transaction is not approved, Friday night  
8 there will be nobody in the building. And it will just  
9 disappear.

10 So, I want to repeat, Your Honor. We're not asking  
11 for a ruling on the sale today, Your Honor.

12 THE COURT: Well, let me just deal procedurally with  
13 what's before me. And I know that you're in effect starting  
14 with the sale procedures motion.

15 MR. MILLER: Yes, sir.

16 THE COURT: I was in early this morning and those  
17 papers didn't make it to the ECF system until sometime after  
18 7:30 --

19 MR. MILLER: Yes.

20 THE COURT: -- I didn't see them until about then.  
21 And knowing the way those lawyers who don't work all night  
22 behave, they often don't get to their offices until sometime  
23 later than that. I have some concerns which I would like you  
24 to address on the record. Recognizing that this is an  
25 absolutely extraordinary transaction with extraordinary

1 importance to the capital markets globally, I still need to  
2 deal with fundamental due process issues.

3 MR. MILLER: Yes, sir.

4 THE COURT: And I would like you to comment -- and  
5 I'm not inviting objections on this basis. I'm just saying I  
6 have a concern as to the adequacy of notice as to the substance  
7 of the transaction for purposes of basic constitutional due  
8 process.

9 MR. MILLER: Yes, sir.

10 MR. DESPINS: Your Honor, I'm sorry to interrupt. I  
11 never do that but I thought that Mr. Miller was making  
12 introductory remarks and therefore I wanted him to finish. But  
13 on this issue, Your Honor -- first of all, let me introduce  
14 myself. Luc Despins with my partner, Dennis Dunne, from  
15 Milbank Tweed, proposed counsel for the official creditors'  
16 committee.

17 THE COURT: That's okay. Debtors' counsel is  
18 proposed counsel, too.

19 MR. DESPINS: Your Honor, we -- the committee has  
20 concerns regarding -- I want to make sure the Court hears us on  
21 that request. Clearly, we're not going to have a prolonged  
22 argument over this but we request, and the committee wanted us  
23 to request, a short adjournment until tomorrow morning so that  
24 we can actually get up to speed and have an informed discussion  
25 or -- or maybe not because maybe this is all -- maybe

1 everything that's going to be approved by the Court is  
2 perfectly appropriate. But we want a short adjournment until  
3 tomorrow morning. We were retained no more than forty minutes  
4 ago, Your Honor. And this -- through no fault of the debtor.  
5 This has nothing to do and we're not faulting the debtor in any  
6 way. It's just that -- happened that way. But it's also  
7 outside of our control.

8 So perhaps, in that context, Mr. Miller could, while  
9 addressing your remarks, also address our request for a short  
10 adjournment until your earliest convenience tomorrow, Your  
11 Honor.

12 THE COURT: Okay. I'm sure he'll do that. But my  
13 introduction to Mr. Miller was less about whether this hearing  
14 should be held at another time and more about dealing with the  
15 timing imperatives that confront the Court. I think everybody  
16 needs to understand that I am personally disposed to doing  
17 everything within my power to accommodating this transaction  
18 within the limits of the law, the procedural rules and  
19 fundamental due process. And all I am asking Mr. Miller to  
20 address right now is my ability within my discretion, which is  
21 remarkably broad, particularly at a time like this, to do  
22 something extraordinary.

23 MR. MILLER: Your Honor, we could not agree with you  
24 more about it being extraordinary. And I want to assure Your  
25 Honor that we were very cognizant of the due process arguments.

1 And if we had the luxury of an asset that would stay in place  
2 or a group of assets that would stay in place and would still  
3 be there two weeks from now, we clearly would have done the  
4 normal process of getting a sale procedures order entered,  
5 having a period of time for people to get -- do whatever due  
6 diligence they wanted to do. Our problem, and what we have  
7 discussed at length, Your Honor, could we possibly do that and  
8 still have a transaction? Would the purchaser stand by during  
9 that period? And what would happen during that period? The  
10 consensus among all of the business people, Your Honor, and the  
11 professionals was there would be nothing to sell in two weeks.  
12 This is really and truly a wasting asset.

13 So what we have tried to do, Your Honor, and as I  
14 have said to Mr. Despins, we will stay up all night with him  
15 and explain this transaction. Again, the only issue that Your  
16 Honor has to decide today which has any significance at all is  
17 the breakup fee. I'm not talking about the DIP. And set the  
18 hearing. I know Your Honor came in early because Your Honor  
19 expected to find the motion papers here.

20 THE COURT: Actually, I expected to find those papers  
21 last evening. But it's all right.

22 MR. MILLER: I have to tell Your Honor, modern  
23 technology is not all that it's cracked up to be.

24 THE COURT: I know.

25 MR. MILLER: And trying to get some stuff through a

1 computer is not so easy and to a printer. And there was a lot  
2 of frustration and a number of statements "Well, I'm about to  
3 commit suicide" but we didn't let that happen.

4 So we took that into recognition, Your Honor. And we  
5 have sent them their websites. We have given as much publicity  
6 as we can possibly give to this, Your Honor. And as I say  
7 again, Your Honor, if it wasn't the unique nature of these  
8 assets, the sensitivity of these assets and what has happened  
9 in the marketplaces -- one of the purposes of doing this  
10 transaction, Your Honor, is to try and soothe the markets and  
11 to -- it'd be a counter force to the volatility that's going  
12 on. I don't know if Your Honor has a screen in your office,  
13 but if you watched what's happening to the market today, it's  
14 dangerous.

15 THE COURT: Unfortunately, I was too busy to look at  
16 any screens and I don't want to find out later. But don't tell  
17 me now, please.

18 MR. MILLER: I'm not going to tell Your -- it would  
19 depress Your Honor to know what's going on out there in the  
20 marketplace. So we have taken that into account and we have  
21 also taken into account, Your Honor, the extremely unique  
22 circumstances that we find ourselves in. This is -- I don't  
23 want to compare it to some -- in a small case, Your Honor, that  
24 you and I may have been involved in twenty years ago where you  
25 had a boat of salmon sitting out on the harbor and the company

1 in Chapter 11 had no money to unload it. That's the kind --  
2 this is such a perishable asset that if we don't take this  
3 action, due process -- nothing will matter. And I think, Your  
4 Honor, everybody who has been involved -- and with due  
5 deference to Mr. Despins and Mr. Dunne. They haven't been  
6 fully briefed on it. But every other party who's been involved  
7 has recognized that problem, including Your Honor, the  
8 Securities and Exchange Commission, the Securities Investor  
9 Protection Corporation and the Federal Reserve Bank.

10 Your Honor -- I have to tell Your Honor, there wasn't  
11 an intention to file so quickly except what happened over the  
12 past weekend. We would have had more time to deal with these  
13 problems. And we understand what Your Honor is under in  
14 connection with due process. But this has been so notorious.  
15 I mean, we have filled up newspapers, we have filled up CNBC  
16 and CNN with stories. We only got pushed off last night by  
17 AIG. We would have liked to have had a portion of the eighty-  
18 five billion dollars but we couldn't get it. So I think, Your  
19 Honor, the proceeding is notorious.

20 THE COURT: I'm going to take judicial notice of the  
21 fact that we have a packed courtroom where we have people  
22 standing and we have an overflow courtroom, the fact that there  
23 are parties represented by experienced and sophisticated  
24 counsel, as evidence that there's no question that parties-in-  
25 interest and parties who are just plain interested know about

1 today's hearing. And I've also had an opportunity to  
2 understand through the press and television and the internet at  
3 least some of the proposed terms and conditions of the  
4 transaction. I think for that reason, I am inclined to  
5 conclude that while this is unusual, and should not be viewed  
6 as a precedent, I believe that here due process is satisfied  
7 simply by virtue of the fact that we're all here together and  
8 that we know what we're talking about.

9 MR. MILLER: I would only add to what Your Honor said  
10 that yesterday was the organizational meeting called by the  
11 Office of the United States Trustee which was in a ballroom at  
12 the Park Lane Hotel in New York City. And if Your Honor had  
13 been in that room, Your Honor would have seen an overflow  
14 audience of people standing all through the hallway. So this  
15 is a known situation, as Your Honor has pointed out. So we  
16 really support Your Honor's ruling that there is adequate due  
17 process.

18 THE COURT: Okay. So we've gotten over that hurdle.  
19 Now, we have Mr. Despins request on behalf of the newly formed  
20 committee that has newly retained counsel to put this over for  
21 a hearing tomorrow. I want to just comment that I have some  
22 issues with respect to that because of my own calendar. But I  
23 will attempt to address that if, in fact, after hearing  
24 argument, if that's necessary, we need to adjust the timing.  
25 But is this the time to debate that question? Or would counsel

1 benefit from a chance to confer? I'm prepared to do it either  
2 way.

3 MR. MILLER: Your Honor, I think --

4 THE COURT: My only sense of this, based upon your  
5 presentation, is that while I am sensitive to the needs of the  
6 creditors' committee to have as much time as possible to  
7 prepare whatever papers it may choose to file, including papers  
8 in support of the transaction for that matter, I am also  
9 conscious of the time line that you have outlined. And what I  
10 consider to be the imperative that this transaction, if it is  
11 to be approved, be approved before the end of the week. As a  
12 result, the request not yet argued by Mr. Despina that this be  
13 put over, that is, this aspect of today's hearing be put over  
14 till tomorrow morning, raises in my mind an additional due  
15 process question which is that the sale procedures and the sale  
16 hearing are even closer together than they would be if I were  
17 to approve the sale procedures today. So that while we take  
18 away from the committee's time to respond to this procedural  
19 motion by approving it, if I do, today, we also take away from  
20 everybody's time to address the merits of the transaction if I  
21 approve it tomorrow instead of today. So, that's the conundrum  
22 that I face.

23 I am inclined not to grant the proposed request for  
24 an adjournment for multiple reasons but I also don't wish to  
25 cut off argument unnecessarily. The multiple reasons include



1 the following: one, I have a calendar tomorrow morning which  
2 includes a number of other cases. And, at least in this court,  
3 every case, regardless of size, is entitled to access to the  
4 Court. And some of the cases that I'm hearing tomorrow are  
5 quite large. Secondly, I believe that this very fast track  
6 case needs to be addressed in an extraordinary way. And for  
7 that reason, while I would, under ordinary circumstances, be  
8 very sensitive to the request of committee counsel to have  
9 additional time, and I've been in that spot myself when I was  
10 in practice, I think that to delay the approval of the sale  
11 procedures would send an intolerably awkward message to the  
12 world. And I'm not prepared to preside over the delivery of  
13 such a message. I believe that we should maintain the schedule  
14 that we're on recognizing that it imposes some burdens on the  
15 parties who need to appear and be heard. But I will also state  
16 that for purposes of the sale hearing, I will be  
17 extraordinarily liberal in allowing parties the ability to  
18 object if they wish to at the very last minute as soon as we  
19 call the hearing because I think that's also consistent with  
20 due process.

21 MR. MILLER: Your Honor, we have no objection to  
22 that. As far as we're concerned, Your Honor, you can extend  
23 the objection date to the hour before whatever the time of the  
24 hearing will be on Friday.

25 THE COURT: Since you offered that, that's what we'll

1 do.

2 MR. MILLER: Very good, Your Honor.

3 MR. DESPINS: Your Honor, normally and with short  
4 deadlines like this, we -- I should say, sometimes the Court  
5 dispenses with the filing of an objection, frankly. We can  
6 make the arguments at the hearing.

7 THE COURT: As far as I'm concerned, every party-in-  
8 interest who has a legitimate need to express a position on the  
9 record will be free to do so at the sale hearing regardless of  
10 whether papers have been filed of record consistent, however,  
11 with providing some fair notice to the debtor of the kinds of  
12 arguments that are going to be asserted. I don't think that  
13 this is appropriately to be designed as a hearing by surprise.  
14 So, as long as there is adequate notice, I think that would  
15 work.

16 MR. MILLER: Absolutely, Your Honor. And anybody who  
17 has an interest, Your Honor, can contact my office. We will  
18 spend the time to explain things. We will set up meetings. We  
19 are very sensitive to the due process argument, Your Honor.  
20 And I agree with Your Honor. Anybody who has a statement to  
21 make, if it's a substantive statement, we'd appreciate a little  
22 notice of what it's going to be but it can be oral without any  
23 problems.

24 THE COURT: I think you're entitled to that notice.  
25 And I guess I'll be the only one surprised by what happens.